



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

December 15, 2010

Mr. Ron Kostelny
President
Indian Springs Village Association
P.O. Box 130291
The Woodlands, Texas 77393

OR2010-18798

Dear Mr. Kostelny:

You ask whether certain information is subject to required public disclosure under the Public Information Act (the "Act"), chapter 552 of the Government Code. Your request was assigned ID# 403148.

The Indian Springs Village Association (the "association") received a request for the association's 2008, 2009, and 2010 check registers.¹ We understand you to claim the requested information is not subject to the Act because the association is not a governmental body for purposes of the Act. We have considered your arguments.

We address the threshold issue of whether the association is subject to the Act. The Act applies to "governmental bodies" as that term is defined in section 552.003(1)(A) of the Government Code. That section contains the following description of an entity as within the meaning of a "governmental body":

[T]he part, section, or portion of an organization, corporation, commission, committee, institution, or agency that spends or that is supported in whole or in part by public funds[.]

Gov't Code § 552.003(1)(A)(xii). The term "public funds" is defined in the Act as "funds of the state or of a governmental subdivision of the state." *Id.* § 552.003(5). "Public funds" from a state or governmental subdivision of the state can be in various forms and can include

¹As you have not submitted the request for information for our review, we take our description from correspondence the requestor submitted to our office.

free office space, utilities and telephone use, equipment, and personnel assistance. *See* Att'y Gen. Op. No. MW-373 (1981).

Both the courts and this office previously have considered the scope of the definition of "governmental body" under the Act and its statutory predecessor. In *Kneeland v. National Collegiate Athletic Association*, 850 F.2d 224 (5th Cir. 1988), the United States Court of Appeals for the Fifth Circuit recognized that opinions of this office do not declare private persons or businesses to be "governmental bodies" that are subject to the Act "simply because [the persons or businesses] provide specific goods or services under a contract with a government body." *Kneeland*, 850 F.2d at 228 (internal quotations omitted) (quoting Open Records Decision No. 1 (1973)). Rather, the *Kneeland* court noted that, in interpreting the predecessor to section 552.003 of the Government Code, this office's opinions generally examine the facts of the relationship between the private entity and the governmental body and apply three distinct patterns of analysis:

The opinions advise that an entity receiving public funds becomes a governmental body under the Act, unless its relationship with the government imposes "a specific and definite obligation . . . to provide a measurable amount of service in exchange for a certain amount of money as would be expected in a typical arms-length contract for services between a vendor and purchaser." Tex. Att'y Gen. No. JM-821 (1987), *quoting* [Open Records Decision No.] 228 (1979). That same opinion informs that "a contract or relationship that involves public funds and that indicates a common purpose or objective or that creates an agency-type relationship between a private entity and a public entity will bring the private entity within the . . . definition of a 'governmental body.'" Finally, that opinion, citing others, advises that some entities, such as volunteer fire departments, will be considered governmental bodies if they provide "services traditionally provided by governmental bodies."

Id. (omissions in original). The *Kneeland* court ultimately concluded that the National Collegiate Athletic Association (the "NCAA") and the Southwest Conference (the "SWC"), both of which received public funds, were not "governmental bodies" for purposes of the Act, because both provided specific, measurable services in return for those funds. *Id.* at 230-31. Both the NCAA and the SWC were associations made up of both private and public universities. *Id.* at 226. Both the NCAA and the SWC received dues and other revenues from their member institutions. *Id.* at 226-28. In return for those funds, the NCAA and the SWC provided specific services to their members, such as supporting various NCAA and SWC committees; producing publications, television messages, and statistics; and investigating complaints of violations of NCAA and SWC rules and regulations. *Id.* at 229-31. The *Kneeland* court concluded that, although the NCAA and the SWC received public funds from some of their members, neither entity was a "governmental body" for purposes of the Act because the NCAA and SWC did not receive the funds for their general

support. *Id.* at 231. Rather, the NCAA and the SWC provided “specific and gaugeable services” in return for the funds that they received from their member public institutions. *Id.*; *see also A.H. Belo Corp. v. S. Methodist Univ.*, 734 S.W.2d 720 (Tex. App.—Dallas 1987, writ denied) (athletic departments of private-school members of Southwest Conference did not receive or spend public funds and thus were not governmental bodies for purposes of Act).

In exploring the scope of the definition of “governmental body” under the Act, this office has distinguished between private entities that receive public funds in return for specific, measurable services and those entities that receive public funds as general support. In Open Records Decision No. 228 (1979), we considered whether the North Texas Commission (the “commission”), a private, nonprofit corporation chartered for the purpose of promoting the interests of the Dallas-Fort Worth metropolitan area, was a governmental body. ORD 228 at 1. The commission’s contract with the City of Fort Worth obligated the city to pay the commission \$80,000 per year for three years. *Id.* The contract obligated the commission, among other things, to “[c]ontinue its current successful programs and implement such new and innovative programs as will further its corporate objectives and common City’s interests and activities.” *Id.* at 2. Noting this provision, this office stated, “Even if all other parts of the contract were found to represent a strictly arms-length transaction, we believe that this provision places the various governmental bodies which have entered into the contract in the position of ‘supporting’ the operation of the [c]ommission with public funds within the meaning of [the predecessor to section 552.003].” *Id.* Accordingly, this office determined the commission to be a governmental body for purposes of the Act. *Id.*

In Open Records Decision No. 602 (1992), this office addressed the status of the Dallas Museum of Art (the “DMA”) under the Act. The DMA was a private, nonprofit corporation that had contracted with the City of Dallas to care for and preserve an art collection owned by the city and to maintain, operate, and manage an art museum. ORD 602 at 1-2. The contract required the city to support the DMA by maintaining the museum building, paying for utility service, and providing funds for other costs of operating the museum. *Id.* at 2. We noted that an entity that receives public funds is a governmental body under the Act, unless the entity’s relationship with the governmental body from which it receives funds imposes “a specific and definite obligation to provide a measurable amount of service in exchange for a certain amount of money as one would expect to find in a typical arms-length contract for services between a vendor and purchaser[.]” *Id.* at 4. We found that “the [City of Dallas] is receiving valuable services in exchange for its obligations, but, in our opinion, the very nature of the services the DMA provides to the [City of Dallas] cannot be known, specific, or measurable.” *Id.* at 5. Thus, we concluded that the City of Dallas provided general support to the DMA facilities and operation, making the DMA a governmental body to the extent that it received the city’s financial support. *Id.* Therefore, the DMA’s records that related to programs supported by public funds were subject to the Act. *Id.*

We further note that the precise manner of public funding is not the sole dispositive issue in determining whether a particular entity is subject to the Act. *See* Attorney General Opinion JM-821 at 3 (1987). Other aspects of a contract or relationship that involve the transfer of public funds between a private and a public entity must be considered in determining whether the private entity is a “governmental body” under the Act. *Id.* at 4. For example, a contract or relationship that involves public funds, and that indicates a common purpose or objective or that creates an agency-type relationship between a private entity and a public entity, will bring the private entity within the definition of a “governmental body” under section 552.003(1)(A)(xii) of the Government Code. The overall nature of the relationship created by the contract is relevant in determining whether the private entity is so closely associated with the governmental body that the private entity falls within the Act. *Id.*

In the present case, you state the association received \$10,000 in funding for the year 2010 from The Woodlands Township (the “township”) pursuant to a Service Agreement (the “service agreement”). You also state The Woodlands Association (“TWA”) and The Woodlands Community Association (“WCA”) each provided \$5,000 funds to the association in “prior years.” We understand “prior years” to include the years 2008 and 2009, which are specified in the request. We first address the funds from TWA and WCA.

TWA and WCA are property owner’s associations that are subject to the Act pursuant to section 552.0036 of the Government Code. *See* Gov’t Code § 552.0036 (providing certain classes of homeowners’ associations are subject to the Act). As mentioned above, you state TWA and WCA provided funding to the association. Although TWA and WCA are subject to the Act, they are not governmental subdivisions of the state. Thus, the funds the association received from TWA and WCA are not “funds of the state or of a governmental subdivision of the state” and, therefore, are not “public funds” for purposes of the Act. *Id.* § 552.003(5). Accordingly, we find the portions of the check registers pertaining to funds received from TWA or WCA in the years 2008 and 2009 are not subject to the Act and need not be released in response to this request for information.

We next address the funds received from the township. The township is a governmental body for the purposes of the Act.² You inform us that the association is managed by volunteers and its purpose is to promote the association and the “greater Woodlands Community.” As discussed above, you state the association has received \$10,000 in funding from the township pursuant to the service agreement between the association and the township, a copy of which you provide to our office. The service agreement states that the “[t]ownship has determined that the [association] provides community-building opportunities for the residents of The Woodlands through programs, events[,] and monthly meetings Accordingly, the [township] has determined to provide financial assistance in support of the [association]” The service agreement provides that the \$10,000 in funding may be used

²In November 2007, the township succeeded the Town Center Improvement District, which was formed by the Texas Legislature in 1993.

for insurance, a minimum of one "Community Spirit" event per year, and to assist in funding administrative and operating expenses. Further, the service agreement prohibits use of the funding for "donations, grants, scholarships or similar purposes." Upon review of the service agreement, we believe these provisions of the agreement place the township in the position of providing general support for the operation of the association with public funds within the meaning of section 552.003 of the Government Code. *See* Gov't Code § 552.003(1)(A)(xii); Open Records Decision No. 228 (1979). Furthermore, we find that the association and the township share a common purpose and objective such that an agency-type relationship is created. *See* Open Records Decision No. 621 (1993) at 9; *see also* Local Gov't Code § 380.001(a), (b) (providing that governing body of municipality may establish and provide for administration of one or more programs, including programs for making loans and grants of public money and providing personnel and services of the municipality, to promote state or local economic development and to stimulate business and commercial activity in the municipality). Accordingly, we determine that the association's receipt of these funds makes it a governmental body for the purposes of the Act to the extent the association is supported by township funds. *See* Gov't Code § 552.003(1)(A)(xii).

We note, however, that an organization is not necessarily a "governmental body" in its entirety. "The *part, section, or portion* of an organization, corporation, commission, committee, institution, or agency that spends or that is supported in whole or in part by public funds" is a governmental body. *Id.* (emphasis added); *see also* Open Records Decision No. 602 (1992) (only the records of those portions of the Dallas Museum of Art that were directly supported by public funds are subject to the Act). Consequently, only records relating to those parts of the association's operations that are directly supported by public funds are subject to the disclosure requirements of the Act. Therefore, we find the portions of the check registers that relate to operations directly supported by the funding received from the township are subject to the Act. Accordingly, this information must be released unless the association demonstrates this information falls within an exception to public disclosure under the Act.

Next, we understand you to assert the association does not maintain the requested information in the format specified by the requestor. The Act does not require a governmental body to make available information that did not exist when the request was received, nor does it require a governmental body to compile information or prepare new information. *See Economic Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. Civ. App.—San Antonio 1978, writ *dism'd*); Open Records Decision No. 452 at 3 (1986). Likewise, a governmental body is not required to produce the responsive information in the format requested or create new information to respond to the request for information. *AT&T Consultants, Inc. v. Sharp*, 904 S.W.2d 668, 676 (Tex.1995); *Fish v. Dallas Indep. Sch. Dist.*, 31 S.W.3d 678, 681 (Tex. App.—Eastland 2000, *pet. denied*); Attorney General Opinion H-90 (1973); Open Records Decision Nos. 452 at 2-3 (1986), 342 at 3 (1982), 87 (1975). However, a governmental body must make a good-faith effort to relate a request to information that is within its possession or control. *See* Open Records Decision No. 561

at 8-9 (1990). Accordingly, the association must make a good faith effort to comply with the instant request.

Finally, we address the association's obligations under section 552.301 of the Government Code, which prescribes the procedural obligations that a governmental body must follow in asking this office to decide whether requested information is excepted from public disclosure. Section 552.301(b) requires that a governmental body ask for a decision from this office and state the exceptions that apply within ten business days of receiving the written request. Gov't Code § 552.301(b). Section 552.301(e) of the Government Code requires submission to this office within fifteen business days of receiving the request (1) general written comments stating the reasons why the stated exceptions apply that would allow the information to be withheld, (2) a copy of the written request for information, (3) a signed statement or sufficient evidence showing the date the written request was received, and (4) a copy of the specific information requested or representative samples, labeled to indicate which exceptions apply to which parts of the documents. *Id.* § 552.301(e). As of the date of this letter, you have not submitted to this office a letter stating any exceptions that apply and written comments as to why such exceptions apply to the information at issue, a copy of the written request for information, any evidence demonstrating the date the request for information was received, or a copy or representative sample of the requested information at issue. Consequently, to the extent the requested records relate to those parts of the association's operations that are directly supported by public funds, we find the association has failed to comply with the requirements of section 552.301 of the Government Code.

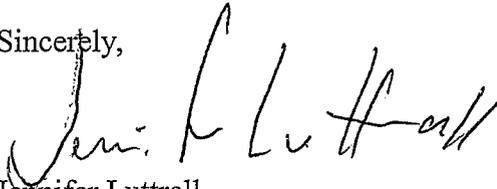
Pursuant to section 552.302 of the Government Code, a governmental body's failure to comply with the procedural requirements of section 552.301 results in the legal presumption that the information is public and must be released unless the governmental body demonstrates a compelling reason to withhold the information to overcome this presumption. *Id.* § 552.302; *Simmons v. Kuzmich*, 166 S.W.3d 342, 350 (Tex. App.—Fort Worth 2005, no pet.); *Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381-82 (Tex. App.—Austin 1990, no writ) (governmental body must make compelling demonstration to overcome presumption of openness pursuant to statutory predecessor to section 552.302); Open Records Decision No. 630 (1994). A compelling reason generally exists when information is confidential by law or third-party interests are at stake. *See* Open Records Decision Nos. 630 at 3, 325 at 2 (1982). Because you have not submitted the requested information for our review, we have no choice but to order the requested information that is subject to the Act released pursuant to section 552.302 of the Government Code.

This letter ruling is limited to the particular information at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other information or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For more information concerning those rights and

responsibilities, please visit our website at http://www.oag.state.tx.us/open/index_orl.php, or call the Office of the Attorney General's Open Government Hotline, toll free, at (877) 673-6839. Questions concerning the allowable charges for providing public information under the Act must be directed to the Cost Rules Administrator of the Office of the Attorney General, toll free at (888) 672-6787.

Sincerely,



Jennifer Luttrall
Assistant Attorney General
Open Records Division

JLU/ds

Ref: ID# 403148

No submitted documents

c: Requestor